COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Complaint of Fiber Technologies Networks, LLC	**)**	**D.T.E. 01-70**

SHREWSBURY'S ELECTRIC LIGHT PLANT'S
OPPOSITION TO FIBER TECHNOLOGIES NETWORKS, LLC'S
MOTION TO COMPEL

Introduction

Pursuant to 220 C.M.R. 1.04(5)(c), Shrewsbury's Electric Light Plant ("SELP") hereby files its opposition to Fiber Technologies Networks, LLC's ("Fibertech") motion to compel responses to information requests. On November 28, 2001, prior to the suspension of the procedural schedule in this matter by the Department of Telecommunications and Energy ("Department" or "DTE"),[1] Fibertech filed a motion to compel responses to certain information requests it served on SELP seeking production of legal opinions rendered to SELP. Fibertech advances two theories in support of its motion: first, that under recent precedent on public records laws, SELP must produce the requested information pursuant to Fibertech's discovery requests; and second, that SELP waived its attorney-client privilege by "voluntarily disclosing the legal opinion of its counsel to a third party." Fibertech Motion to Compel, p. 8. As set forth below, both these arguments must fail and Fibertech's motion must be denied.

[1] The Department suspended the procedural schedule in this matter pursuant to a joint motion of the parties on November 30, 2001.

Summary of Argument

Fibertech never made a public records request of SELP or the Town of Shrewsbury. Thus, precedent regarding the public records laws and the attorney work product rule has no relevance to this discovery dispute. Further, the Supervisor of Records adjudicates public records disputes, not the Department.

Additionally, there has been no waiver of either the attorney-client privilege or the work product doctrine. Presumably, just like SELP, Fibertech received legal advice regarding its efforts to seek pole attachments from SELP. Despite Fibertech's desperate attempts to paint this garden-variety, statutorily-governed pole attachment dispute as some sort of complex antitrust action that entails exploration of completely irrelevant matters such as motives or liability of SELP for denying a pole attachment request, the central issue in this case does not involve any examination by the Department of bad faith or willful activity on the part of SELP. Instead, it involves only the question of whether Fibertech is a "licensee," and whether its dark fiber is an "attachment" under G.L. c. 166A, § 25A. Fibertech can gain information regarding whether it is a "licensee" and whether its dark fiber is an "attachment" from the same sources that SELP can use and has used, such as Massachusetts and federal laws, regulations and precedent. The basis of SELP's denial has, and always remains, applicable law. See, e.g., SELP's Response, ¶2.

Lastly, Fibertech argues that it needs the information for "defense of its claim against SELP." Fibertech's Motion to Compel, p. 11. It is Fibertech that has filed a complaint at the DTE *against* SELP. For Fibertech to argue that it needs SELP's legal opinion regarding pole attachment laws to

either defend or prosecute claims is frivolous and represents a waste of the resources of everyone involved in this matter.

ARGUMENT

I. FIBERTECH'S PUBLIC RECORDS ARGUMENTS CANNOT BE MADE BEFORE THE DEPARTMENT.

While Fibertech argues, in detail, that it is entitled to SELP's legal opinion because the opinion is not subject to an exemption to the public records act (G.L. c. 66, § 10) pursuant to G.L. c. 4, §7, Twenty-sixth, Fibertech has no basis for making such an argument before the Department. SELP merely listed the many grounds for not providing the requested legal opinion, and related documents, in response to Fibertech's discovery request, including the fact that such documents could not be obtained pursuant to public records laws. Contrary to Fibertech's assertions, in the absence of ever receiving a public records request from Fibertech, SELP is not required, in response to discovery requests, to identify which exemption to the public records act would apply to the documents sought. However, for the sake of the speedy resolution of pending discovery disputes, SELP can state at this time that the exception applicable to documents it has withheld is in fact found at G.L. c. 4, §7, Twenty-sixth (d) ("inter-agency/policy deliberation" exemption.)

It is well-settled that Fibertech's recourse at this point is to the Supervisor of Public Records, and not the Department. G.L. c. 66, § 10(b). In Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co., 414 Mass. 609 (1993), the Supreme Judicial Court held that an arbitrator had no authority to decide the scope of the public records act in the context of a discovery dispute. Hull, supra at 615. In that case, the Court noted:

> Failure or refusal by the custodian of records to comply with a discovery request may be addressed by a petition to the supervisor of public records who decides whether the

> documents are within the statute. Subsequent failure to comply with an order issued by the supervisor is referred to the Attorney General or a district attorney… The Superior Court and the Supreme Judicial Court are empowered to order compliance….
>
> …[T]he scope of the arbitration act does not confer on the arbitrator the power to determine the scope of the public record statute. As the statute indicates, *only the supervisor of public records, the Superior Court, or this court is authorized to make such decisions* (emphasis added).

[citations omitted.] Id. at 614-615. Similarly, while the Department might ordinarily consider all applicable law in adjudicating a discovery dispute, nothing in G.L. c. 164 (or G.L. c. 166) confers on the Department the authority to apply the public record statute. See id. at 615. Therefore, the question of whether the documents withheld by SELP fall within an exemption to the public records act must be taken by Fibertech to the Supervisor of Public Records.

Because Fibertech cannot make its public records arguments here, SELP is under no obligation to address Fibertech's exposition on General Electric Co. v. Department of Environmental Protection, 429 Mass. 798 (1999). However, that case makes clear that SELP's documents can be shielded from disclosure pursuant to G.L. c. 4, § 7, Twenty-sixth (d). Exemption (d) exempts from disclosure "inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency." It does not, however, apply to "reasonably completed factual studies or reports on which the development of such policy positions has been or may be based." A rather significant portion of this exception to the exemption – the "factual studies or reports" provision -- is noticeably absent from Fibertech's argument that "any policy positions by SELP are not longer 'being developed.'" Clearly, this litigation is ongoing, and the documents do not pertain to factual studies or reports, they pertain to a legal opinion, so this provision is inapplicable here.

Further, Fibertech fails to cite anything in support of its propositions that SELP is "not a policymaking body" and that the law recognizes a distinction between "operational" and "policy decisions." That is because both propositions are baseless. First, SELP makes many "policy decisions." While the manager is charged with the day to day operations of a municipal light plant under G.L. c. 164, § 56, it is the municipal light board that dictates policy. See, e.g., Golubek v. Westfield Gas & Elec. Board, 32 Mass.App.Ct. 954, 956 (1992). Most certainly a municipal light plant, including SELP, might develop a policy on pole attachments. SELP could also develop "policy" with regard to litigation. In any event, the applicability of the exemption is under the jurisdiction of the Supervisor of Public Records.

II. REGARDLESS OF THE DISCLOSURE OF THE LEGAL OPINION TO THE TOWN, THE OPINION IS STILL EXEMPT FROM DISCLOSURE UNDER THE PUBLIC RECORDS ACT.

Fibertech further argues that SELP has waived its attorney-client privilege by disclosing its legal opinion to certain Town of Shrewsbury ("Town") officials. While the Town is in fact a distinct operational and financial entity from SELP, it ultimately owns SELP, and often looks to SELP for guidance on matters that pertain to both SELP and the Town. E.g., Municipal Light Comm. of Taunton v. State Employees Group Ins. Commission, 344 Mass. 533, 536 (1962) ("municipal lighting plants are municipal property and a 'debt for plant' is a municipal debt"); G.L. c. 44, § 8(8) (municipal light plant can only borrow money throw the town that owns it); G.L. c. 164, § 34. Here, SELP has shared information with the Town to assist the Town in making decisions regarding the use of its public ways, which is inextricably related to the pole attachment law. See G.L. c. 166, §§ 21, 22 and 25A.

Therefore, the opinion was transmitted as part of inter-agency memoranda and letters regarding to policy positions.

In the General Electric case cited by Fibertech, the Court found that "the sharing of these documents and information [by DEP] with EPA was integral to the defendant's internal decision making processes regarding the contaminated sites, the defendant is entitled to assert protection of the shared materials under exemption (d)." General Electric Co., supra at 807. Just like DEP and EPA, the Town and SELP share documents and information that are integral to each other's internal decision making processes. Indeed, the Town is currently facing a petition, and pressure from Fibertech to hold hearings on its request for grants of location in the public ways- a request for wires that have not yet been authorized to be attached to SELP's poles. Response to Fibertech 1-1. It should hardly come as a surprise to Fibertech that the SELP and the Town have shared information regarding such interrelated matters. The documents are protected from disclosure therefore under exemption (d) to the public records act.

Finally, Fibertech's assertion that "basic fairness" dictates that Fibertech be given SELP's legal opinion is ludicrous because it is obvious that the opinion concerns interpretation of the pole attachment law. Fibertech has ample opportunity and resources to contradict SELP's legal position on its own. This concept is discussed further below in the section addressing Fibertech's "at issue" waiver argument, which must fail for similar reasons.

III. SELP HAS NOT WAIVED THE ATTORNEY-CLIENT PRIVILEGE.

Fibertech erroneously asserts in its Motion to Compel that SELP has waived its attorney-client and work product privileges by placing the advice of counsel "at issue" in this case. See *Motion to Compel*, p.10. In so doing, Fibertech relies upon a faulty analysis of the "at issue" doctrine as applied

by Massachusetts Courts and further seeks to support its assertions with case law that is at best entirely distinguishable and at worst completely inapposite. Contrary to Fibertech's assertions, SELP has neither sought to rely on the advice of counsel as a defense, nor placed the advice of counsel "at issue" in any other fashion.

Not only is Fibertech's analysis erroneous, Fibertech conveniently fails to mention that there is a "'presumption in favor of preserving the privilege.'" Dedham-Westwood Water Dist. v. National Union Fire Insurance Co. of Pittsburgh, No.CIV.A. 96-00044, 2000 WL 33419021, *5 (Mass. Super. February 4, 2000), quoting Greater Newburyport Clamshell Alliance v. Public Serv. Co. of New Hampshire, 838 F.2d 13, 20 (1st Cir. (D.N.H.) (1988). The underlying reason for this consideration is that "[a] court 'cannot justify finding a waiver of privileged information merely to provide the opposing party information helpful to its cross-examination or because information is relevant.'" Id., quoting Remington Arms Co. v. Lib. Mutual Ins. Co., 142 F.R.D. 408, 415-416 (D.Del. 1992). Plainly, Fibertech seeks SELP's legal opinions in an attempt to enhance its legal strategy and not because the privilege has been waived.

Fibertech fails to establish that the requirements of waiver have been satisfied. SELP has neither affirmatively asserted protected information, nor placed protected information at issue. And as required to waive the privilege, Fibertech has not and cannot demonstrate that it has been denied access to information vital to its claims. The only issues truly at dispute in this matter are whether Fibertech is a "licensee" and whether its dark fiber is an "attachment" as defined by M.G.L. c. 166, §25A. A determination of this matter involves a straightforward legal analysis and argument regarding the interpretation of statutory law; analysis and argument that Fibertech and its counsel are qualified to make. It is not SELP's obligation to educate opposing counsel on the law. The fact that SELP's

testimony indicates that it received the advice of counsel with regard to the interpretation of statutory law should come as no surprise to Fibertech and put Fibertech at no disadvantage. Fibertech is perfectly able to consult with its own counsel and argue the legal merits of its claim without SELP's disclosure of privileged material.

Fibertech's resort to its analysis of the "advice of counsel" defense also is a desperate attempt to show that SELP waived attorney-client privilege. SELP has absolutely nothing to "defend" in this regulatory proceeding. In the cases that Fibertech cites where courts have found a waiver of the attorney-client privilege, there exists an element of bad faith or willfulness to which the reliance on an attorney's advice is a defense. In fact, the advice of counsel defense relies on several factors, all of which are designed to show good faith on the part of the party asserting the defense. These factors include:

> (1) *he is acting in good faith in the belief that he has good cause for his action and is not seeking an opinion in order to shelter himself*; (2) he has made a full and honest disclosure of all the material facts within his knowledge or belief; (3) he is doubtful of his legal rights: (4) he has reason to know that his counsel is competent; (5) he honestly complied with his counsel's advice; and (6) his counsel is of such training and experience that he is able to exercise prudent judgment in such matters.

G.S. Enterprises, Inc. v. Falmouth Marine, Inc., 410 Mass. 262, 275 (1991) (emphasis added). Proof of willfulness is not pertinent to Fibertech's case in these proceedings and SELP has not offered the advice of counsel as a defense to a charge of willfulness. SELP's thought processes and the bases for its actions have absolutely no bearing on whether Fibertech qualifies for an attachment under G.L. c.166, § 25A. Fibertech's entire case centers on convincing an adjudicating body that it is a licensee pursuant to the strictures of G.L. c.166, §25A and nothing more.

None of the cases Fibertech cites in its motion aids its argument here. The majority of those cases involve claims of willful patent infringement to which the alleged infringers affirmatively offer their reliance on the opinions of counsel as a defense to infringement claims and seek to admit the written opinions of their attorneys as evidence. See Saint-Gobain/Norton Indus. Ceramics Corp. v. General Elec. Co., 884 F. Supp. 31, 33 (D.Mass. 1995) (Alleged infringer "asserted an advice of counsel defense to . . . charge of willful infringement . . . [and] produced two written opinions (and related documents) of independent patent counsel" supporting its contention); see also Nitinol Medical Technologies, Inc., 135 F.Supp.2d at 214 (alleged infringer asserted defense of advice of counsel and sought to rely on "letters of counsel to [alleged infringer]");[2] see also Micron Separations, Inc., 159 F.R.D. at 362 (alleged patent infringer raised defense of advice of counsel and produced attorney's opinion letter and supporting documents in support of defense).

Fibertech's reliance on other cases is similarly misplaced. These cases revolve around "a 'crucial issue' relevant to the defendant's *good faith*." Coleco Industries, Inc. v. Universal Studios, Inc., 110 F.R.D. 688, 691 (S.D.N.Y. 1986) (emphasis added), citing Handguards, Inc. v. Johnson & Johnson, 413 F. Supp. 926 (N.D.Ca. 1976) (patent infringement case); see also Holmgren v. State Farm Mutual Automobile Insurance Co., 976 F.2d 573, 577 (9th Cir. 1992) (third-party tort victim asserted bad faith in settlement of insurance claim. "In a *bad faith* insurance claim settlement case, the 'strategy, mental impressions and opinion of [the insurer's] agents concerning the handling of the claim are directly at issue'") (emphasis added) (citation omitted).

---

[2] In Nitinol, the Court further limited the scope of any waiver, stating , "The 'waiver of the attorney-client privilege as to one issue does [not] serve as a waiver of the privilege as to all issues.'" Id. at 217 (brackets in original), quoting Micron Separations, Inc. v. Pall Corp., 159 F.R.D. 361, 365 n.8 (D.Mass. 1995).

The theory underlying the "at issue" waiver in advice of counsel defense cases, as the above-cited cases explain, is based on the principle "that it would be fundamentally unfair to allow a party to disclose opinions which support its position, and simultaneously conceal those which are adverse." Saint Gobain, 884 F. Supp. at 33; see also Abbot Laboratories v. Baxter Travenol Laboratories, 676 F. Supp. 831, 832 (N.D.Ill., 1987) ("[a] party claiming good faith reliance upon legal advice could produce three opinions of counsel approving conduct at issue in a law suit and withhold a dozen or more expressing grave reservations over its legality. Preservation of privilege in such a case is simply not worth the damage done to truth" [citation omitted]). Simply put, a party may not affirmatively rely on the advice of its counsel as a defense to a claim of bad faith or willful activity and simultaneously withhold information relating to that reliance.

Here, SELP does not seek to rely on the advice of counsel as a defense to allegations of bad faith in its determination that Fibertech is not a "licensee" under M.G.L. c.166, § 25A. Moreover, SELP has neither sought to introduce any privileged documents concerning its attorneys' opinions in this matter, nor has it sought to introduce the substance of those opinions as a defense to any claim. The crux of this matter does not involve issues of bad faith or willful activity on the part of SELP, but rather centers on the interpretation of statute; an interpretation that each party can fully argue without resort to privileged material.

CONCLUSION

For the foregoing reasons, Fibertech's motion to compel should be denied.

Respectfully submitted,

SHREWSBURY'S ELECTRIC LIGHT PLANT

By its attorneys,

Kenneth M. Barna
Diedre T. Lawrence
Rubin and Rudman LLP
50 Rowes Wharf
Boston, MA 02110
Tel. No. (617) 330-7000

Dated: January 25, 2002